Supreme Court, U.S.
FILED
JUL 28 1994
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(2)

No. 93-1867

In the
Supreme Court of the United States
October Term, 1994

MARTIN COUNTY, FLORIDA
Petitioner,
vs.
RICHARD WOUTERS, *et al.*,.
Respondents.

ON PETITION ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JERRY G. TRAYNHAM*
BENJAMIN R. PATTERSON III
Patterson & Traynham
315 Beard Street
Post Office Box 4289
Tallahassee, Florida 32315
(904) 224-9181
Attorneys for Respondents

*Counsel of Record

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QUESTIONS PRESENTED

Whether the Eleventh Circuit's construction of the administrative rules adopted by the United States Department of Labor, implementing a limited exception for "fire protection" and "law enforcement" activities to the overtime provisions of the Fair Labor Standards Act (FLSA), is a correct interpretation which rationally ascribes functionality to each of the provisions of 29 C.F.R. §§553.210 *et seq.* and furthers the legislative purpose of 29 U.S.C. §207(k) by exempting only actual fire protection and law enforcement activities.

PARTIES TO THE PROCEEDINGS

The petitioner is this case is Martin County, Florida, a political subdivision of Florida.

The respondents are Richard Wouters, Timothy H. Walker, Karin T. Klause, David Vity, Janet S. Zoldak, Frank R. Pino, Ranae D. Cerezo, Wade H. Mallard, Mark R. Bents, David L. Zarker, Stephen G. Smith, Terry N. Wilkes, Jr., Errol L. Wright, Jr., Rebecca L. Pickering, Daniel Wouters, Karen S. Jordan, Richard M. Wilde, Georgene Bailes, Carlton L. Jones, Mark D. Hellstrom, William Mahneke, James D. Kay, Joseph V. Ferrara, William M. Godfrey, Moetahar Padellan, Marc Ducote, Shannon K. Walker, Mark L. Whitlock, and Anne Davis.

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Respondents, Richard Wouters, Timothy H. Walker, Karin T. Klause, David Vity, Janet S. Zoldak, Frank R. Pino, Ranae D. Cerezo, Wade H. Mallard, Mark R. Bents, David L. Zarker, Stephen G. Smith, Terry N. Wilkes, Jr., Errol L. Wright, Jr., Rebecca L. Pickering, Daniel Wouters, Karen S. Jordan, Richard M. Wilde, Georgene Bailes, Carlton L. Jones, Mark D. Hellstrom, William Mahneke, James D. Kay, Joseph V. Ferrara, William M. Godfrey, Moetahar Padellan, Marc Ducote, Shannon K. Walker, Mark L. Whitlock, and Anne Davis, urge the Court to deny the petition for writ of certiorari to review the judgment and

opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on December 21, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 9 F.3d 924 (11th Cir. 1993), and is reproduced in the petitioner's appendix at 1a through 21a.

The order of the District Court for the Southern District of Florida (Gonzalez, Jose A. Jr.) is reported at 793 F. Supp 310 (S.D. Fla. 1992), and is reproduced in the petitioner's appendix at 23a through 31a.

JURISDICTION

The Court's jurisdiction has been invoked by petitioners under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

29 U.S.C. §207(k)

[Reprinted in petitioner's appendix at 36a]

29 C.F.R. §§553.210 - 553.215

[Reprinted in petitioner's appendix at 36a through 44a]

STATEMENT OF THE CASE

A. Facts Material To Consideration Of The Question Presented

At all relevant times, Respondents were employed by the petitioner, Martin County, in its Department of Public Safety as Emergency Medical Services (EMS) personnel, and served as either Emergency Medical Technicians (EMTs) or as Paramedics (PMs).[1] (App. 2a-3a). This case involves the question whether it has been appropriate under the FLSA for the petitioner to pay overtime compensation to its EMS personnel as "firefighters", taking advantage of the limited exception provided by 29 U.S.C. §207(k). The dispute arises because — with the exemption — an employer must pay an overtime premium to "fire protection" employees after 53 hours in a work week, and to "law enforcement" employees after 43 hours. Otherwise, an employer must pay the overtime premium after 40 hours.

The facts found by the Court of Appeals and by the district court are substantially undisputed. Firefighters and EMS personnel comprise the county's emergency response system. Since this litigation began, the county has reorganized the system, by including firefighters and EMS personnel in the same division of the county public safety department. (App. 3a, 13a). Although the emergency response system does not include law enforcement personnel, EMS personnel respond to some emergencies

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[1] Petitioner's Statement of the Case is substantially correct. Our departures are noted below. For ease of understanding, we have attempted to mirror the terminology and organizational structure used by petitioner.

with firefighters, to other emergencies with law enforcement officers, and to other emergencies alone.[2] The petitioners' statistics show that during the studied period — from 1989 through 1991 — firefighters responded to 4,648 calls. Fifty-seven percent of the responses were with EMS personnel. During the same time period, however, the county's records show EMS personnel responded to 26,647 calls, including 5,872 calls with law enforcement officers. The Court of Appeals surmised the EMS personnel responded to approximately 50 percent of their calls without participation by either firefighters or law enforcement officers. The evidence does not show the relative amount of time EMS personnel spent in responding to calls with firefighter, with police officers, and alone. The evidence does not show which of the joint responses with firefighters or police officers included a response by all three elements. (App. 4a-7a). In addition, the county's statistics are relatively imprecise, because they are drawn from several different sources and contain categorical break downs which do not precisely overlap.

EMS personnel are intended to provide emergency treatment in a variety of circumstances, including fires, accidents, crimes, hazardous materials incidents, natural disasters and medical crises. They do not handle routine,

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[2] Generally, EMS personnel respond with firefighters on calls involving structure fires, vehicle accidents, and for medical assists. (App. 4a). They generally respond alone for other medical assists involving abdominal pains, allergic reactions, amputations, aneurysm, asthma, back pain, cardiac, choking, stroke, diabetic, electric shock and similar medical problems. Responses with police officers take place for automobile accidents, stabbings, rapes, poisonings, suicide attempts, drownings, gunshot wounds, assaults, dead persons, mentally ill persons and overdoses. (App. 6a-7a).

non-emergency, matters. All of their working hours are dedicated to EMS functions, such as emergency responses, vehicle and equipment maintenance, training, facility housekeeping, or awaiting an emergency call. (App. 3a-4a).

Firefighters and EMS personnel possess different skills. EMS personnel are not trained as firefighters. Most firefighters, however, are certified EMTs as well. Paramedics, in addition to EMT training, are trained in advanced life support techniques (ALS), which neither firefighters nor EMTs may perform. Paramedics and EMTs respond in teams to provide emergency medical support. (App. 4a).

Firefighters and EMS personnel work similar shifts, 24 hours on duty followed by 48 hours off. EMS personnel generally respond to calls in assigned ambulances, while firefighters respond in their assigned fire trucks.[3] Prior to this litigation, firefighters and EMS personnel were assigned to different divisions; they have subsequently been placed in a single Emergency Services Division of the county public safety department. Firefighters and EMS personnel belong to different unions and have different retirement plans. The record does not indicate whether law enforcement personnel share unions or retirement plans with EMS personnel. Firefighters and EMS personnel, even when jointly dispatched, operate on different radio frequencies. The record does not indicate whether the frequencies emanate from a share dispatch center, or whether law enforcement officers operate on the same frequencies or share the same

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[3] In one instance, a paramedic assigned to a fire station responds to calls aboard the fire truck.

dispatch center with either firefighters or EMS personnel. (App. 3a-7a).

B. Course Of Proceedings In The District Court

The respondents brought this action seeking to recover the overtime premium required by the FLSA for work beyond 40 hours in a work week. The petitioner defended by arguing that EMS personnel are firefighters and law enforcement personnel within the meaning of 29 U.S.C. §207(k), entitling the county to defer paying an overtime premium until an employee had worked 53 hours in a work week. The county also argued it was entitled to avoid liability because of its "good faith."

On cross-motions for summary judgment, the district court entered judgment for the county, finding that EMS personnel employed by the county provide services, within the meaning of 29 C.F.R. §215, which are "substantially related" to fire fighting, because respondents have "received training" in the rescue of fire, crime and accident victims or firefighters or law enforcement officers injured in the performance of their duties, and respondents are "regularly dispatched" to fires, crime scenes, riots, natural disasters, and accidents. (App. 25a).

The district court also found the so-called "20% Rule", set forth in 29 C.F.R. §553.212 to be fully applicable to ambulance and rescue service personnel for whom an exemption under 207(k) is sought. (App. 26a). Section 553.212 provides that the exemption is not applicable to an employee otherwise covered by 207(k) if the employee spends more than 20 percent of his work hours performing non-exempt activities. The district court noted that the crucial inquiry is what constitutes "non-exempt" work.

Rejecting the respondents' contention that non-exempt work is any work unrelated to fire protection or law enforcement activities, the court held that non-exempt work is work unrelated to ambulance and rescue service.

> The plaintiffs argue that non-exempt activity includes *anything* that is not related to firefighting, accident scenes, etc. For example, in the plaintiffs' view, if EMTs responded 50% of the time with the fire department and 50% of the time to heart attack victims, the responses to heart attacks would be non-exempt activity. The consequence of this interpretation is that 80% of EMS responses must be with the Fire Department or the County loses its 7(k) exemption.
>
> The defendants urge, as stated above, that exempt activity includes all duties incident to ambulance and rescue service. Thus, nonexempt work for EMTs would be working on the "road crew" or assisting the Parks Department, to name two examples. The interpretation urged by the defendant is only reasonable given the fact that § 553.215 explicitly takes into account the nature of work performed by ambulance service personnel. There is no indication that the "other" ambulance duties should be construed as nonexempt activity.
>
> Accordingly, the court finds that ambulance service activity which is unrelated to fire rescue does not count as nonexempt activity.

(App. 27a, emphasis in original).

Because the district court decided petitioner was entitled to summary judgment on the merits of its claim of exemption under 29 U.S.C. §207(k), it declined to decide

whether petitioner was entitled to a defense premised upon "good faith," holding the issue moot. (App. 31a).

C. Course of Proceedings Before The Eleventh Circuit Court of Appeals

The Circuit Court held that respondents are entitled to overtime compensation after 40 hours of work, unless the employer can establish entitlement to an exemption. The panel held that 7(k) of the Code of Federal Regulations provides a partial exemption, as fire protection and law enforcement activity, for ambulance and rescue service personnel who are employed by a public agency other than a law enforcement or fire protection agency, and their services are substantially related to fire protection or law enforcement. The Circuit Court noted that such services are substantially related if the EMS personnel have received training in rescue, and are regularly dispatched with firefighters or police officers. The court agreed with the district court that respondents have received appropriate training. (App. 9a).

The panel also held under 29 C.F.R. §212(a) that the 7(k) partial exemption is lost if the ambulance or rescue employees spend more than 20 percent of their work time performing non-exempt activities.

> Nonexempt work is that "which is not performed as an incident to or in conjunction with [the employees'] fire protection or law enforcement activities." This Court has held that work generally benefiting the employer, which employees are required to do while not engaged in activities related to their fire protection or law enforcement duties, is nonexempt work. Finally we note that exemptions from section 7(a) must be

> narrowly construed against the employer who bears the burden of proving any exemption.

(App. 10a, bracketed material in original, citations omitted).

The Eleventh Circuit panel vacated the district court's summary judgment order, finding the lower court "could not find as a matter of law that plaintiffs fell into either the firefighter or police officer exemption for overtime pay after forty hours of work because the inquiry did not first address the material fact of the number of *hours* spent in each type of exempt activity." (App. 12a, emphasis in original). The panel held that the district court's focus on the number of responses made by EMS personnel with firefighters or police officers or separately did not address the regulation's concern for the amount of time EMS personnel spend performing fire protection or law enforcement activities.

> The regulation's plain language requires comparison of the number of *hours* spent in each type of activity instead of the percentage of calls falling into each classification.

(App. 11a, emphasis in original, footnote omitted).

After vacating the district court's summary judgment order, the appellate panel went on to instruct the district court on the issues on which certiorari is now sought.[4] Among other issues, the panel specifically instructed the district court that EMS hours which are unrelated to fire protection or Law enforcement activities are non-exempt under the 20 percent rule.

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[4] Because the panel's additional rulings were unnecessary to the disposition on appeal, they may well constitute dicta.

> We have previously implicitly imposed upon the employer the burden of showing that its exemption is not defeated by the 20% rule. *Id.* At 682 ("By superimposing the 80/20 rule [on the substantially related test], only those public agencies whose ambulance and rescue service employees spend a substantial amount (at least 80%) of their work hours in related activities are eligible for the section 7(k) exemption."). In keeping with the principle that exemptions from section 7(a) must be narrowly construed against the employer who also bears the burden of proof, *O'Neal*, 980 F.2d at 677, we now hold explicitly that to defeat an employee suit, the employer must demonstrate entitlement to an exemption under either the law enforcement or firefighter provisions, and also that the exempt employees work at least 80% of the time in related activities.

(App. 15a-16a).

The panel remanded to the district court for substantial additional factual and legal development.

WHY THE WRIT SHOULD BE DENIED

ARGUMENT

> Whether the Eleventh Circuit's construction of the administrative rules adopted by the United States Department of Labor, implementing a limited exception for "fire protection" and "law enforcement" activities to the overtime provisions of the Fair Labor Standards Act (FLSA), is a correct interpretation which rationally ascribes functionality to each of the provisions of 29 C.F.R. §§553.210 *et seq.* and furthers the legislative purpose of 29 U.S.C. §207(k) by exempting only actual fire protection and law enforcement activities.

The Eleventh Circuit's decision in this case studiously follows the language of the statute and its implementing regulations, and gives both a construction which effectuates the statutory purpose.

The reasons given by the petitioner for granting the writ do not militate in favor of review, and particularly not at this stage of development. Petitioner's argument that the Circuit Court has failed to give deference, or special deference, to the Department of Labor's regulatory scheme is barren. There is, simply, so support for this view. Nowhere within the appellate decision is there any language which rejects the regulations in favor of the panel's view of the meaning of the statute. Rather, the Court gives a construction to the rules which is in harmony with the statute. Even if the Eleventh Circuit construction were incorrect — and we believe it was not — the appellate court would not have failed to give deference to the regulatory scheme. The petitioner's real point is that it disagrees with

the construction adopted by the Circuit Court, and prefers the construction applied by the district court. Standing alone, this disagreement is not a reason for granting review by the Supreme Court.

The Eleventh Circuit's view is the better one, because it recognizes that the exemptions provided under 29 U.S.C. §207(k) were promulgated for fire protection and law enforcement functions. There is no statutory exemption for ambulance and rescue services employees. However, the Department of Labor's regulations recognize that in many circumstances ambulance and rescue services employees may be predominantly involved in providing fire protection or law enforcement services. In those instances, where the ambulance and rescue services activities are "substantially related to" or are an "integral part of" fire protection or law enforcement, the regulations treat the employees as firefighters or police officers for purposes of overtime pay. The regulations provide a rational means for identifying those employees who are providing the exempt services.

The regulatory scheme also provides a safeguard, in the form of 29 C.F.R. 553.212, to insure that employees otherwise subject to the exemption are performing fire protection or law enforcement activities to a sufficient degree to merit the statutory exemption. The Eleventh Circuit decision applies this 20 percent rule even handedly to all employees within the ambit of the exemption, whether they are firefighters, police officers or ambulance and rescue service employees. This is the only logical approach, because the focus is on whether the employees are sufficiently performing fire protection or law enforcement activities to fall within the exemption statutorily provided for fire protection and law enforcement activities.

The petitioner prefers the district court's construction, which would apply the 20 percent rule, but would count ambulance and rescue services duties which are unrelated to fire protection or law enforcement as exempt work. This approach is actually antithetical to the regulatory scheme, since the differentiation between exempt and non-exempt work does not further the inquiry into the degree to which the employees are engaged in fire protection or law enforcement. Oddly, the district court's example in rejecting the respondents' position illustrates well the anomaly that is created unless the 20 percent rule is used to differentiate between activities which are related or unrelated to fire protection and law enforcement. The district court projected that "in the plaintiffs' view, if EMTs responded 50% of the time with the fire department and 50% of the time to heart attack victims, the responses to heart attacks would be non-exempt activity", and the 20 percent rule would defeat the exemption. Yet if one applied the district court's rule, but reversed the example, the result is truly anomalous. If firefighters and EMS personnel responded jointly to 50 percent fires and to 50 percent heart attacks, the exemption would be lost for the firefighters, but not for the EMS personnel.

The Eleventh Circuit's approach appropriately and rationally construes both the statute and the implementing regulations.

The petitioner's second point, that this case presents an important issue which should be settled by this Court, is also ill-considered. This case presents only a straight-forward, uncomplicated question of statutory and regulatory construction, on which the federal judicial circuits are in harmony. This case, together with the decisions in *Bond v. City of Jacksonville,* 939 F.2d 285 (5th Cir. 1991); *Justice v.*

Metropolitan Govt. Of Nashville, 4 F.3d 1387 (6th Cir. 1993); *O'Neal v. Barrow County Bd of Comm'rs,* 980 F.2d 674 (11th Cir. 1993); and, *Spires v. Ben Hill County,* 980 F.2d 683 (11th Cir. 1993); are substantially all of the decisions which address the issue. While there are some differences in the application of the statute and rules, there is no conflict among the circuits regarding the issue in this case.. Ordinarily both the absence of a conflict among the circuits, and the relatively sparse development of the decisional law should militate against review by this Court. Indeed, the fact that the regulations have remained unchanged since 1974 and have produced no conflict among the federal circuits indicates the issue involved is probably not of great national importance, nor nearly as complicated as petitioner indicates.

There are other substantial reasons for not granting the writ. First, the factual and legal record in this case is particularly unsettled. The Eleventh Circuit has remanded the case for substantial additional factual and legal development. There has been insufficient fact-finding on the questions of the relative amounts of time EMS personnel spend performing fire protection activities, law enforcement activities, and purely emergency medical services activities. The Circuit Court has also remanded with instructions for the district court to consider (1) whether the change in petitioner's organizational structure changes the legal analysis, (2) whether the "integral part" language of 29 C.F.R. §553.210(a) presents a separate standard which must be met, and (3) whether the petitioner is entitled to a "good faith" defense. Until these issues are fully developed, this case makes a poor vehicle for fashioning national policy.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Eleventh Circuit should be denied.

Respectfully submitted,

JERRY G. TRAYNHAM*
BENJAMIN R. PATTERSON III
PATTERSON & TRAYNHAM
315 Beard Street
Post Office Box 4289
Tallahassee, Florida 32315
(904) 224-9181

Attorneys for Respondents

*Counsel of Record